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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:

Petition of the State of Ohio
For Authority to Continue to
Regulate Commercial Mobile
Radio Service.

PR Docket No. 94-109

To: The Commission

DOCKET FILE COPY ORIGINAL

OPPOSITION TO PETITION FOR RECONSIDERATION

GTE Mobilnet Incorporated ("GTE Mobilnet"), by its attorneys, hereby opposes the Petition for Reconsideration ("the Petition"), filed by the Public Utilities Commission of Ohio ("PUCO") in the above-captioned proceeding. GTE Mobilnet vigorously opposed the original Statement^{1/} of the PUCO. As will be set forth below, the PUCO's present Petition is a procedurally and substantively improper attempt to sanction its continued rate and market entry regulation in Ohio.

I. Background

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The PUCO's original Statement in this Docket consisted of

^{1/} Statement of the Public Utilities Commission of Ohio's Intention to Preserve Its Right for Future Rate and Market Entry Regulation of Commercial Mobile Services.

6 pages. It contained no specific information on the condition of the CMRS market in Ohio; it made no attempt to supply concrete data in any of the eight specific categories cited by the Commission in Section 20.13 of the rules; it did not address, directly or indirectly, the fundamental test posed by the Omnibus Budget Reconciliation Act ("OBRA").^{2/} The Commission therefore quite correctly denied the PUCO's Petition in light of these deficiencies. In the Matter of Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Service, ___ FCC Rcd. ___ (1995), PR Docket 94-105, released May 19, 1995, FCC 95-193 ("Ohio Order").

The PUCO now represents in its Petition for Reconsideration that its intention in filing its original Statement was merely to inform the Commission of its existing non-rate regulatory authority and to preserve its right "to pursue more traditional rate and market entry regulation in the future." PUCO Petition at p. 1. Because the PUCO's Petition utterly fails to comply with the specificity requirements of Section 1.106(d)(1) and (2) of the Commission's rules,^{3/} it is difficult to discern in what

^{2/} A petitioning state must demonstrate that "(i) market conditions with respect to [CMRS] services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory, or (ii) such market conditions exist and such service is a replacement for landline telephone exchange service within such State." 47 U.S.C. § 332(c)(3)(A).

^{3/} Section 1.106(d)(1) states:

The petition shall state with particularity the respects

respects the PUCO seeks reconsideration. The only explicit request found anywhere in the Petition is that the PUCO be permitted to supplement its Petition with the results of an ongoing proceeding which it apparently plans to resolve in contravention of OBRA and the Ohio Order. That relief is plainly impermissible and should be dismissed. To the extent that the PUCO seems to be pressing its authority to continue statutorily prohibited rate and entry regulation, the Commission should reiterate its previous conclusions in this regard and deny the PUCO's request to continue this regulation. These points will be addressed briefly below.

II. Procedural Defects

There are a number of grievous procedural infirmities in the PUCO Petition which render it fatally defective. PUCO's Petition fails the most basic requirements of any petition for reconsideration. The rules require a petitioner (1) to "state with

in which petitioner believes the action taken by the Commission or the designated authority should be changed. The petition shall state specifically the form or relief sought and, subject to this requirement, may contain alternative requests.

47 C.F.R. § 1.106(d)(1). Section 1.106(d)(2) states:

The petition for reconsideration shall also, where appropriate, cite the findings of fact and/or conclusions of law which petitioner believes to be erroneous, and shall state with particularity the respects in which he believes such findings and conclusions should be changed. The petition may request that additional findings of fact and conclusions of law be made.

47 C.F.R. § 1.106(d)(2).

particularity the respects in which petitioner believes the action taken by the Commission ... should be changed" and (2) to "state specifically the form or relief sought...." 47 C.F.R. § 1.106(d)(1). The PUCO provided no such specifics whatsoever; indeed, one is forced to speculate that the PUCO somehow disagrees with the Ohio Order's limitation on its authority to pursue certain complaints, but this is nowhere stated in the Petition. The Commission should not have to infer or guess at the relief requested by a petitioner, nor should it have to deduce what error is complained of, particularly in the absence of any demonstration of why the original action by the Commission may have been erroneous to begin with. Clarity takes on added urgency given the extremely abbreviated time frame afforded the Commission to act on this Petition.^{4/} The PUCO has simply not presented a coherent body of material which the Commission can meaningfully or usefully address.

Secondly, the PUCO is attempting to use the petition for reconsideration process to hold open the window of opportunity for it to submit data in support of its attempt to continue rate regulation. The PUCO seeks leave to supplement its Petition at some unspecified later date with the results of an on-going complaint proceeding. This request cannot be granted. The time for the PUCO to submit evidence or to "develop the record" with respect to rate regulation was August 9, 1994. As of that date --

^{4/} 47 U.S.C. § 332(c)(3)(B).

prescribed by OBRA itself -- the PUCO had had a year to marshall whatever evidence it intended to present. Instead, on August 9, 1994, the PUCO chose not to submit any evidence at all. It would subvert the statutory scheme entirely if the PUCO were allowed to await the outcome of its Petition and only then submit evidence. "We cannot allow the appellant to sit back and hope that a decision will be in its favor and then, when it isn't, to parry with an offer of more evidence." Colorado Radio Corp. v. FCC, 118 F.2d 24, 26 (D.C. Circuit 1941). Moreover, the supplementation suggested by the PUCO could not, in a practical sense, be permitted by the Commission. The Commission's action on this Petition must be completed by August 9, 1995. To permit this supplementation would mean holding the record open in this proceeding indefinitely, in direct conflict with the statutory mandate. The PUCO's recourse under the statutory scheme is not to delay implementation of the original rate preemption, but rather to petition the Commission for renewed rate authority at a later date if market conditions at that time so warrant. 47 U.S.C. § 332(c)(3)(A).

More fundamentally, the PUCO's approach here is a case of the snake swallowing its own tail. The PUCO is seeking to resolve a complaint regarding rates in order to justify continuing to resolve complaints regarding rates. That is, the PUCO is proposing to use continued rate regulation authority as a means to achieve the end of continued rate regulation authority. This bootstrapping approach stands the petition process established by OBRA on its

head. Whatever authority the PUCO had over rate regulation ended on August 10, 1994. Its August 9, 1994 Statement was not effective to prolong that authority. In effect, the PUCO is simply asking the Commission to extend the duration of its authority over rate complaints for an indefinite period beyond the statutorily prescribed cut-off date. That the statute will not allow. The PUCO's Petition should therefore be dismissed.

III. The PUCO May Not Continue to Regulate Rates Via Complaint Proceedings

The lack of specificity of the PUCO Petition poses substantive dangers as well. The PUCO has laid out for the Commission, both in the text of its Petition and in excerpts attached from its 1993 Order on Competitive Telecommunications Services, a number of regulatory actions which it intends to pursue. While some of the actions may fall within the range of monitoring activities which the Commission has deemed permissible at ¶ 44 of the Ohio Order, others are in direct contravention of both that Order and OBRA itself. As the PUCO has noted, its authority to determine rate-related complaint cases is presently before the U.S. District Court in Ohio.^{5/} GTE Mobilnet's concern is that, if the Commission merely dismisses the PUCO Petition without condemning the unlawful regulatory activities expressly contemplated by the PUCO, the District Court could interpret the

^{5/} GTE Mobilnet of Ohio, LP, et al. v. David W. Johnson, Commissioner, et al., No. C2-95-401 (S.D. Ohio filed May 2, 1995).

Commission's silence as implicit endorsement of the PUCO's extremely broad interpretation of the statute. Accordingly, GTE Mobilnet believes there would be value in the Commission's clearly reiterating the conclusions reached in the Ohio Order at ¶¶ 43-45. These include the following:

- A. The PUCO has no authority to regulate marketplace entry whatsoever, whether by new entrants or entrants acquiring existing carriers.
- B. Having lost the authority to regulate CMRS rates, the PUCO's authority over complaints is limited to customer billing information and practices, billing disputes and other consumer protection-type matters not related to rates. Rate regulation of wholesale or retail rates, whether by rate prescription or resolution of specific complaints, is barred by OBRA.
- C. While monitoring of carrier/customer and carrier/reseller relations is permissible, such authority does not include a state's approving or disapproving rate levels or establishing rate margins based on information which it has gathered. The latter constitutes a form of rate regulation clearly barred by the statute.

Because the complaint of Westside Cellular, Inc. d/b/a Cellnet is specifically addressed by the PUCO in its Petition, it bears mention here. The Cellnet complaint is founded on its assertion that wholesale cellular rates in Ohio are too high for a variety of alleged (but never substantiated) reasons such as cross-subsidization, unlawful discrimination between affiliated and unaffiliated entities, etc. The PUCO has acknowledged that resolution of the complaint "may well involve a review of the rates

charged" by the cellular carriers, but asserts that "reviewing rates" is not the same thing as "setting rates." See Defendant's Memo Contra in Docket C2-95-401, supra. Obviously, however, the PUCO's "review" of the rates necessarily involves a determination of whether they are proper -- the very determination sought by Cellnet -- and thus would constitute exactly the sort of state rate regulation proscribed by Congress.^{6/}

In Ohio, Cellnet is now furiously seeking to recast its complaint as one which will somehow enable the PUCO to mandate adjustment of the rates charged Cellnet but yet will not constitute "rate regulation." Because the specifics of this particular complaint are now before the federal court, GTE Mobilnet does not ask the Commission to rule on the appropriateness of the PUCO's attempt to exercise jurisdiction over it. However, re-affirmation in clear terms of the statutory prohibition against state rate regulation of any kind will provide invaluable guidance to the Court and the industry in resolving this and future disputes.

IV. Conclusion

The PUCO Petition is procedurally defective on numerous grounds and should therefore be dismissed. However, because the

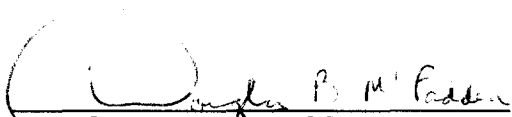
^{6/} Cellnet is apparently seeking in the state commission forum the sort of declaration which another reseller had previously sought from a federal court in Detroit and from this Commission. Cellnet Communications, Inc. v. Detroit SMSA Limited Partnership, 9 FCC Rcd. 3341 (CCB, 1994).

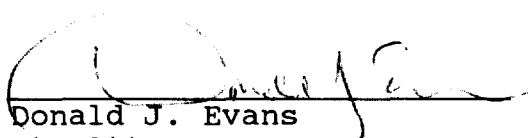
PUCO has stated its apparent intention to pursue regulation of market entry and of wholesale rates (by resolution of a reseller rate complaint), the Commission should affirm its earlier determination that Ohio has no authority to regulate rates or entry as specified, in Section III, supra.

Respectfully submitted,

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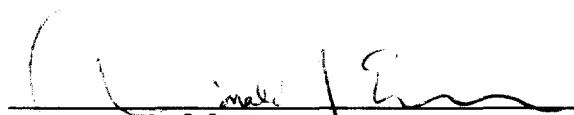
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